UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSEMARIE ANKNEY, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C08-0666-MAT REPORT AND RECOMMENDATION

Plaintiff Rosemarie Ankney proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied her application for Disability Insurance (DI) benefits after a hearing before an administrative law judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends REMANDING this matter for further administrative proceedings.

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I. FACTS AND PROCEDURAL HISTORY

Ms. Ankney was born on XXXX, 1955.[1] After receiving a high-school equivalency diploma (GED), she attended cosmetology training with some business classes, became a licensed cosmetologist, and received a certification in office skills. (AR 208, 340.) Her prior work experience includes twenty-two years of employment at Airborne Airfreight in various positions, including as a receptionist, a customer service clerk, a pricing clerk, and an executive assistant. (AR 342-43, 346.) Ms. Ankney was last gainfully employed as an assistant to the president of Airborne in April 2004, at which time she was laid off due to the company's acquisition by DHL. (AR 341.)

Ms. Ankney is insured for DI benefits through December 31, 2009. (AR 14.) In January 2005, she protectively filed an application for DI benefits. (AR 56-61.) Ms. Ankney alleged disability with an onset date of November 1, 2004, due to morning nausea and vomiting; chronic fatigue; difficulty with focusing attention; abdominal and back pain; difficulty in getting up and down, sitting and typing on a computer, and walking; blurred vision; and urinary frequency. (AR 344-45, 353-55.) According to Ms. Ankney, these symptoms are the result of the combined effects of juvenile diabetes with retinopathy and cataracts, depression, hepatitis C, obesity, and her status after coronary artery bypass graft surgery. (AR 50, 54, 72-73, 134, 343-57.) Her application was denied at the initial level and on reconsideration, and she timely requested a hearing.

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[1] Ms. Ankney's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

On January 23, 2007, an ALJ held a hearing, taking testimony from Ms. Ankney, medical expert (ME) Dr. John Lindberg, and vocational expert (VE) Michael Swanson. (AR 337-67.) On June 29, 2007, the ALJ issued a decision finding plaintiff not disabled. (AR 18.) Ms. Ankney's timely administrative appeal of the ALJ's decision was denied by the Appeals Council (AR 4-6), making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On April 28, 2008, Ms. Ankney timely filed the present action challenging the Commissioner's decision. (Dkt. 1.)

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. § 405(g).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

> (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Ankney bears the burden of proving that she is disabled within the meaning of the Social Security Act (Act). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A)*see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At step five, the

burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any step in the sequence, the inquiry ends without the need to consider subsequent steps.

Step one asks whether the claimant is presently engaged in "substantial gainful activity." 20 C.F.R. §§ 404.1520(b).[2] If she is, disability benefits are denied. If she is not, the Commissioner proceeds to step two. At step two, the claimant must establish that she has one or more medically severe impairments, or combination of impairments, that limit her physical or mental ability to do basic work activities. If the claimant does not have such impairments, she is not disabled. 20 C.F.R. §§ 404.1520(c). If the claimant does have a severe impairment, the Commissioner moves to step three to determine whether the impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d). A claimant whose impairment meets or equals one of the listings for the required twelve-month duration requirement is disabled. *Id.*

When the claimant's impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step four and evaluate the claimant's residual functional capacity (RFC). 20 C.F.R. §§ 404.1520(e). Here, the Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f). If the claimant is able to perform her past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in

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[2] Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. § 404.1520(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

In concluding that Ms. Ankney is not disabled, the ALJ found as follows:

1. **Step One:** Ms. Ankney has not engaged in substantial gainful activity since the alleged onset date of November 1, 2004.

2. **Step Two:** Ms. Ankney suffers from the severe impairments of juvenile diabetes, hepatitis C, moderate obesity, and status post coronary artery bypass graft.

3. **Step Three:** Ms. Ankney does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

4. **Step Four:**

    a. Ms. Ankney has the RFC to perform sedentary work activities, i.e., to lift and/or carry up to 10 pounds occasionally but less than 10 pounds frequently; to stand and/or walk up to 2 hours out of an 8-hour workday; and to sit up to 6 hours out of an 8-hour workday.

    b. Ms. Ankney is capable of performing past relevant work as a customer service clerk and as a pricing clerk.

5. **Step Five:** Alternatively, even if Ms. Ankney were limited to unskilled work, she would still be "not disabled" under the framework of Medical-Vocational Rules 201.14 and 201.21.

(AR 12-18.)

VI. ISSUES ON APPEAL

Ms. Ankney raises the following issues on appeal:

1. Did the ALJ err by improperly assessing Ms. Ankney's RFC? (Step Four)

2. Did the ALJ err by finding Ms. Ankney's testimony to be not entirely credible? (Steps Two and Four)

3. Did the ALJ err by relying improperly on the VE's testimony and failing to make a specific finding regarding the physical and mental demands of her past relevant work? (Step Four)

4. With respect to his alternative finding, did the ALJ err by failing to find Ms. Ankney disabled as of her 50th birthday? (Step Five)

(Dkt. 14 at 1.) She asks the Court to reverse the Commissioner's decision and to remand this case for an award of disability benefits or, alternatively, to remand for further administrative proceedings. (Dkt. 14 at 16.)

VII. DISCUSSION

A. Medical Opinions and the Assessment of Ms. Ankney's RFC

A determination of disability requires consideration of the medical opinions in the record. 20 C.F.R. §§ 404.1527 and 416.927. *See also* Social Security Ruling (SSR) 96-5p ("The adjudicator is required to evaluate all evidence in the case record that may have a bearing on the determination or decision of disability, including opinions from medical sources about issues reserved to the Commissioner.") In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). An ALJ may reject contradicted opinions of treating or examining physicians with "'clear and convincing reasons'" and uncontradicted opinions with "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoted sources omitted). "'The ALJ can meet this burden by setting out a detailed and thorough

summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.'" *Magallanes*, 881 F.2d at 751 (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)). Also, the Commissioner must consider the opinions of state agency medical and psychological consultants as opinions of nonexamining physicians and psychologists. SSR 96-6p ("[While not bound by them, ALJs and the Appeals Council] may not ignore these opinions and must explain the weight given to the opinions in their decisions.")

"Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81 F.3d at 834 (finding that, if doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen* , 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See*, *e.g.*, *Schneider v. Commissioner of SSA*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations is sufficient to meet or equal [a listing.]"); *Smolen v. Chater*, 80 F.3d 1273,1292 (9th Cir. 1996) (holding that ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony was legally insufficient; finding record fully developed and disability finding clearly required).

However, courts retain flexibility in applying this "'crediting as true' theory." *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true). As stated by one district court: "In some cases, automatic reversal would bestow a benefits windfall upon

an undeserving, able claimant." *Barbato v. Commissioner of SSA*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

"Ordinarily, RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p; *see* 20 C.F.R. § 404.1545(a). In determining a claimant's RFC, an ALJ must assess all the evidence (including the claimant's and others' descriptions of limitation, and medical reports) to determine what capacity the claimant has for work despite her impairments. *See id.*; SSR 96-8p. The ALJ considers a claimant's ability to meet physical and mental demands, sensory requirements, and other functions. *See* 20 C.F.R.§§ 404.1545(b-d).

Ms. Ankney contends that the ALJ erred in finding her capable of working on a "regular and continuing basis" because he failed to account for and develop the record regarding the impact of hepatitis C on her symptoms of fatigue, alleged vision difficulties, her abdominal hernia, urinary frequency, and carpel tunnel syndrome. (Dkt. 14 at 12-14.) She is correct as to the impact of hepatitis C on her symptoms of fatigue. Although the ALJ left the record open in order to receive the forthcoming results of Ms. Ankney's liver biopsy, he failed to discuss how those results squared with ME's uncontradicted opinion that hepatitis C may have caused liver damage and consequent, debilitating fatigue. Ms. Ankney is, however, incorrect with respect to the other alleged impairments because the record does not adequately support her contention that those conditions led to an inability to perform past, relevant work. The Court, therefore, recommends remanding to the ALJ so that he may submit the liver biopsy results to the ME and consider the

impact of those results on Ms. Ankney's RFC.

1. Hepatitis C, Fatigue, and the Liver Biopsy

The ALJ appeared to accept the ME's uncontradicted opinion that Ms. Ankney's hepatitis C may be causing debilitating fatigue, requested that the results of a forthcoming liver biopsy be sent to him immediately, and then ultimately did not discuss the results of the liver biopsy and their impact on his decision. In response to the ALJ's question about whether a person with Ms. Ankney's medical history could complete a normal work week on a regular and consistent basis, the ME Dr. Lindberg responded:

> I think it is possible, but now I'm reading something we don't know and that is more recent evaluations of her liver function, *the liver biopsy, the – and the status of her liver condition at the present time even though her liver function is within satisfactory limits. The fatigue can impair a person continuing in a 40 hour a week work week.*

(AR 361 (emphasis added).) Shortly thereafter, the following exchange occurred:

> ALJ: So doctor, you would – you'd like to know what – why she got sent over to Harborview [Medical Center] and what these lab tests are and what the result of the liver biopsy is?
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> ME: Except I think that at the present time, the liver situation may be the major situation . . . . [F]ollowing up the hepatitis C is the major –
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> ALJ: You go back on the thirty-first?
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> CLMT: Pardon me?
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> ALJ: You go back on the thirty first?
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> CLMT: Yes.

(AR 365.) The ALJ then directed that the record remain open until March 2007, so that he could receive "the liver biopsy. . . . liver function tests and anything else you can give me regarding

functional capacity." (AR 366.)

On April 19, 2007, Ms. Ankney's counsel faxed the ALJ three pages of results from Harborview Medical Center. (AR 334-36.) The first page was the liver biopsy report of a sample taken on January 31, 2007. (AR 334.) The final diagnosis was "1. Chronic hepatitis consistent with hepatitis C (grade 2, stage 2, Batts & Ludwig)," and "2. Minimal macro- and microvesicular steatosis." (*Id.*) The pathologist explained that diagnosis as follows:

> The liver biopsy demonstrates mild portal and lobular chronic inflammation, scant areas of necrosis and mild periportal fibrosis. In addition, there is minimal fatty change and perisinusoidal fibrosis suggestive of a component of streatohepatitis of drug/toxin effect. The special stain for Gomori trichrome highlights the areas of fibrosis. The reticulin stain highlights areas of central perisinusoidal fibrosis. The special stain for iron is negative.

(*Id.*) The second and third pages of the facsimile were the results from blood tests on Ms. Ankney in September and December of 2006 and January of 2007, the most comprehensive being from September 2006. (AR 335-36.)

When the ALJ issued his decision on June 29, 2007, he cited the blood tests in support of his finding that Ms. Ankney did not suffer from debilitating fatigue as a result of her hepatitis C. (AR 17.) The ALJ did not, however, discuss the relevance of the liver biopsy or even acknowledge the existence of the biopsy results. His full discussion of the role of hepatitis C on Ms. Ankney's alleged disability was as follows:

> The record does indicate findings consistent with hepatitis C, which results in some fatigue (Exhibit 16F/3-4). The claimant's liver function test, however, specifically her bilir[u]bin and albumin levels, were in the normal range. An October 28, 2005 treatment note indicates that the claimant reported not having checked her hepatitis C in quite some time, which indicates that it is not as severe as alleged (Exhibit

> 11F/18).[3] A July 26, 2006 treatment note indicated that the claimant's liver bloodwork looked "good" (Exhibit 9F/2). A December 26, 2006 treatment note indicated that the claimant was told that her liver was okay (Exhibit 15F/6).[4] There is no indication that hepatitis C limits the claimant to less-than-sedentary exertional-level work.

(*Id.*) Thus, although Dr. Lindberg testified that the liver biopsy would enlighten him on the role of hepatitis C on Ms. Ankney's fatigue "even though her liver function is within satisfactory limits," (AR 361), the ALJ found that Ms. Ankney suffered no debilitating fatigue because her blood work showed her liver function was within satisfactory limits.

Ms. Ankney is correct that the ALJ may not request evidence that relates directly to the question of disability and then choose not to assess it. An ALJ has a duty to "fully and fairly" develop the record. *Smolen*, 80 F.3d at 1288. Here, the ALJ could not have offered specific and legitimate reasons to reject the ME's uncontradicted opinion on the role of Ms. Ankney's hepatitis C on her fatigue in the absence of an evaluation of the liver biopsy results. *See Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (stating that an ALJ has a duty to develop the record further when the evidence is ambiguous or inadequate for a proper evaluation).

The Commissioner contends that "[i]t was not necessary for the ALJ to develop the record because the findings from the surgical pathology report indicated only mild changes." (Dkt. 18 at 8.) According to the Commissioner, because Ms. Ankney's physician suggested that "[i]f her

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[3] This statement is best examined in full context. The October 2005 treatment note states: "She has hepatitis C and says that she has not been checked in quite some[]time. She was told that she needed a biopsy, but was unable to do this because her coronary artery disease was discovered at about the same time." (AR 261.)

[4] The 2006 treatment note actually states, "In 1990, she had a liver biopsy and was told 'the liver was okay.'" The results of a 1990 liver biopsy shed little light upon on the current status of Ms. Ankney's liver.

liver biopsy returns with a stage 2 or less, [they] would not approach treatment," if the ALJ erred at all, his omission constituted harmless error. (*Id.*; AR 327.) The Commissioner's position actually underscores the inadequacy of the record on this issue. A physician's choice not to treat an acknowledged medical condition does not always imply the absence or insignificance of symptoms.[5] Without additional testimony or evaluation it is thus not possible to credit the Commissioner's assertion that "[p]laintiff's biopsy results were consistent with the medical evidence." (Dkt. 18 at 8.) As one study noted, "[a] number of pitfalls can be encountered in the interpretation of common blood liver function tests. These tests can be normal in patients with chronic hepatitis or cirrhosis." David E. Johnston, *Special Considerations in Interpreting Liver Function Tests*, American Family Physician (Apr. 15, 1999), *located at* http://www.aafp.org/afp/990415ap/2223.html (last visited Jan. 6, 2009) (quoting abstract) (also describing how overall hepatic function can be assessed by applying the values for albumin, bilirubin and prothrombin time in the modified Child-Turcotte grading system); *see also* C J Healey, et al., *Liver histology in hepatitis C infection: a comparison between patients with persistently normal or abnormal transaminases*, 37 Gut: An International Journal of Gastoenterology and Hepatology 274-78 (1995), *abstract available at*

[5] There are instances, such as with terminal illness, that physicians recommend palliative care to improve their patients' quality of life over more invasive procedures that might halt the progression of the disease. *See generally* World Health Organization, *WHO Definition of Palliative Care*, *located at* http://www.who.int/cancer/palliative/definition/en/ (last visited Jan. 6, 2009). Here Ms. Ankney's physician stated that in light of a stage 2 result from the liver biopsy, "[t]he patient and I both agree that treatment would not be our first choice due to her other health concerns." (AR 327.) This statement could imply that treatment would cause a decrease in her quality of life as much as it could imply that her liver condition is not the source of significant symptoms.

http://gut.bmj.com/cgi/content/abstract/37/2/274 (last visited Jan. 6, 2009) ("[S]ignificant liver pathology (chronic persistent hepatitis or chronic active hepatitis) was found in nine of 19 (47%) of cases with repeatedly normal transaminases. Liver biopsy is advised in all cases of chronic hepatitis C infection to accurately assess both the degree of fibrosis and the current activity of the disease.") (quoting abstract). That is, a patient could have liver blood work that falls into a normal range and yet still suffer from significant liver damage. This is why the ALJ left the record open after the ME's testimony, and yet the ALJ cited the blood work as a reason for rejecting Ms. Ankney's complaints of fatigue related to hepatitis C without discussing possible contradictions.

Ms. Ankney's pathologist employed the Batts and Ludwig staging and grading system for evaluating chronic hepatitis and specified Grade 2, Stage 2 damage. [6] (AR 334.) That is, Ms. Ankney suffers from periportal fibrosis (Stage 2), which is considered "mild" (Grade 2) because it involves some or all portal tracts in piecemeal necrosis along with "mild" lobular inflammation, necrosis, and hepatocellular damage. Rahn, *supra* note 6, at 111. Although her pathologist indicated what he would do in the event of a Stage 2 result, he gave no indication of what he would be done in the event of a *Grade* 2 result, and there is no indication that all grades of liver damage should be treated in the same manner. It is plausible that a physician might treat a Grade 0 (portal inflammation only, without lobular or piecemeal necrosis), Stage 2 result conservatively but treat a Grade 4 (severe piecemeal necrosis, bridging necrosis, severe/prominent lobular

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[6] Batts and Ludwig scores range from 0 to 4: the *grade* measures the degree and location of inflammation (0 = portal inflamation only (no lobular or piecemeal necrosis); 4 = severe, with bridging necrosis and severe inflammation/prominent necrosis, diffuse hepatocellular damage); the *stage* measures the extent of the fibrosis, provides an etiology based on the biopsy, and suggests clinical information (0 = no fibrosis; 4 = cirrhosis). Shelley B. Rahn, *Liver Biopsy Interpretation in Chronic Hepatitis*, 33 J. Ins. Med. 110, 110-11 (2001).

inflammation and diffuse hepatocellular damage), Stage 2 result more aggressively. Similarly, the record does not indicate how rapidly the damage to Ms. Ankney's liver has progressed, which also may factor into a physician's treatment recommendations.[7]

The record is not fully and fairly developed with respect to whether Ms. Ankney is capable of working on a regular and continuous basis due to debilitating fatigue because the ALJ did not provide specific and legitimate reasons backed by substantial evidence for rejecting the ME's uncontradicted opinion that the liver biopsy results might elucidate the source and severity of her condition. The Court therefore recommends remanding to the ALJ for further development of the record, which should include the submission of the most recent liver biopsy results to the ME and a discussion of the liver biopsy results. The ALJ should consider any updated medical evidence with respect to Ms. Ankney's liver damage and hepatitis C, as well as any follow-up tests regarding liver function, if any, that are recommended by the ME or treating physicians.

2. Vision Difficulties, Abdominal Hernia, Urinary Frequency, and Carpal Tunnel Syndrome

Ms. Ankney argues that the ALJ should have further developed the record about her alleged vision difficulties, and that he failed to consider her abdominal hernia, urinary frequency, and carpal tunnel syndrome. The Commissioner responds that the ALJ's treatment of these impairments was adequate because the severity of her subjective complaints[8] was not supported

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[7] For example, if Ms. Ankney's scores were Grade 0, Stage 0 in 1990, a physician might opine that the damage has progressed slowly. If her scores were Grade 0, Stage 0 in 2006, the same physician might conclude that the damage has spread quickly.

[8] The ALJ's determination of Ms. Ankney's credibility is discussed in greater detail in the following section.

by the medical evidence and did not, in any event, suggest a more limited RFC than the one assessed. The Commissioner is correct that the record does not necessitate a more detailed assessment of these maladies.

The ALJ took testimony about Ms. Ankney's vision problems both from Ms. Ankney and the ME. (AR 353-55, 357-58.) Ms. Ankney's vision was last evaluated in 2004. (AR 357.) At that time, she had 20/20 vision in both eyes, her diabetic retinopathy had been stable for eight years, and her healthcare provider stated that the "mild retinopathy seen 2 years ago was gone." (AR 121, 285, 355, 357-58.) At the 2007 hearing before the ALJ, Ms. Ankney complained about vision difficulties that she attributed to retinopathy and cataracts. She stated, "[m]y vision has gotten fuzzy – fuzzier. I used to be able to read without my glasses at least a little bit and now I can't. Even with my glasses, it's still kind of fuzzy." (AR 355.) With respect to her distance vision, she stated, "I used to be able to see the TV guide on the TV and I can't see it now unless I'm right at the TV, you know." (*Id.*)

The ALJ did not err by not developing the record further with respect to Ms. Ankney's vision difficulties. Ms. Ankney's testimony suggested little more than that she can read with eyeglasses, her eyeglass prescription should be updated, and she has developed myopia. She presented no evidence whatsoever that her vision difficulties contributed to an inability to perform work-related activities.

With respect to Ms. Ankney's other maladies, both cumulatively and individually, the Court is required to affirm the RFC determination if the ALJ applied the proper legal standard and the decision is supported by substantial evidence. See*Morgan v. Commissioner of SSA*, 169 F.3d 595, 599 (9th Cir. 1999). The ALJ need not prepare a function-by-function analysis for medical

conditions or impairments that the ALJ found neither credible nor supported by the record. *Bayliss v. Barnhart* , 427 F.3d 1211, 1217 (9th Cir. 2005); *see* SSR 96-8p (defining RFC); *see generally* 20 C.F.R. § 404.1529(c) (setting forth criteria for evaluating the intensity and persistence of symptoms); SSR 96-7p (setting forth criteria for evaluating symptoms and credibility).

Although the ALJ took testimony about Ms. Ankney's abdominal hernia, urinary frequency, and carpal tunnel syndrome (AR 351, 353, 356-57), he considered them in his decision more broadly as other factors concerning her functional limitations and restrictions due to pain or other symptoms. (AR 16-17.) The ALJ found that although Ms. Ankney's medically determinable impairments could be expected to produce some of her alleged symptoms, her subjective complaints concerning the intensity, persistence, and limiting effects of these symptoms were not entirely credible. (AR 17.) The ALJ noted that Ms. Ankney's chief complaints were "abdominal pain, nausea, fatigue and difficulty concentrating." (*Id.*) He then concluded that neither pain nor any other impairment inhibited Ms. Ankney's ability to perform work consistent with a sedentary RFC. (*Id.*) In doing so, the ALJ rejected the State Agency Physical RFC Assessment finding that Ms. Ankney was capable of performing more strenuous, light exertional-level work because the State Agency finding failed to adequately consider her obesity and subjective complaints, and was not consistent with the record. (*Id.*)

With respect to the abdominal hernia, the medical treatment notes indicated that Ms. Ankney's resultant pain was controlled by medication. (AR 322-25.) In May 2006, the treatment notes indicated that she had not needed pain medication for three months but had requested it because she planned on taking an outdoor trip where she would do "more exertion-type activity

and would like to have medication just in case." (AR 325.) In December 2006, the treatment notes indicated that her abdominal pain was helped by a proton pump inhibitor. (AR 326.)

With respect to urinary frequency, Ms. Ankney's complaints about the condition (AR 356) were not supported by any indications that it impaired her capability to perform sedentary work. The ME noted that while at the hearing she referred to symptoms related to her bladder, the medical record revealed a kidney issue related to her coronary bypass surgery, and her kidneys appeared to have regained full function since that time. (AR 358.)

With respect to carpal tunnel syndrome, Ms. Ankney testified that she had difficulty using her hands, and a single treatment note from May 2006 mentioned that the numbness and tingling in her hands were consistent with carpal tunnel syndrome. (AR 325, 353.) Nevertheless, the May 2006 note also mentioned that the symptoms occurred "when she wakes up in the morning" and "she thinks its because she sleeps with her wrist bent and lying on her wrists." (AR 325, 353.) The record contains no other support for Ms. Ankney's assertion that she experienced continued difficulties with her hands or wrists or that her ability to work either as a customer service clerk or as a pricing clerk would be impaired.

In making his RFC determination the ALJ need not have considered in greater detail Ms. Ankney's abdominal hernia, urinary frequency, and carpal tunnel syndrome because the severity of these subjective complaints was not supported by record. *See Bayliss*, 427 F.3d at 1217 . Rather, the ALJ applied the proper legal standard and his decision that these maladies did not limit Ms. Ankney to less-than-sedentary exertional-level work was supported by substantial evidence, including, among other factors, her daily activities, work record, the ME's testimony, and her symptoms as reflected in the medical record. (AR 17.) The Court therefore recommends

affirming the ALJ's findings with respect to the role of these other alleged impairments on Ms. Ankney's RFC.

B. Assessment of Ms. Ankney's Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir.2001). In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. SSA*, 119 F.3d 789, 792 (9th Cir. 1997); *see* 20 C.F.R. § 404.1529(c); *Smolen*, 80 F.3d at 1284-85; SSR 96-7p.

Ms. Ankney argues that the ALJ erred by partially rejecting her testimony. More specifically, she contends that the ALJ made an adverse credibility determination based on Ms. Ankney's stated reasons for stopping work, his misinterpretation of medical evidence, and a lack of medical treatment. (Dkt. 14, at 10.) The Commissioner responds that the ALJ properly rejected Ms. Ankney's subjective symptom complaints because they were inconsistent with other evidence in the record. (Dkt. 18, at 4.) According to the Commissioner, the ALJ drew negative inferences regarding Ms. Ankney's credibility because she left work in 2004 for non-disability related reasons and because there was evidence to support medication non-compliance. (*Id.*)

First, Ms. Ankney contends that the ALJ should not have considered her credibility to be lessened by her reasons for stopping work because she testified that she was absent from work several times a month in the year before she left and only filed for disability months later when her heart condition was discovered and her symptoms had worsened. While these are valid arguments, the record does not demand that only Ms. Ankney's inferences from the facts be taken as true. The ALJ found as follows:

> The claimant has an excellent earnings record, which enhances her credibility. On the other hand, the claimant was laid off from her job and did not quit secondary to a medical problem, which lessens the credibility of allegations of being unable to work.

(AR 16.) That is, the ALJ examined counterpoised inferences regarding Ms. Ankney's work history: a positive one for her excellent earnings record and a negative one for not leaving work despite having suffered from many of the same, longstanding medical issues as those raised in her application for DI benefits. Ms. Ankney testified that she did not seek work after being laid-off because she wanted to "take some time off and enjoy not working." (AR 349.) The ALJ need not have weighed the fact that Ms. Ankney stopped work for non-medical reasons only in a positive or an entirely neutral manner, and there is no indication that it was given an inappropriately determinative weight. *See, e.g.*, *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (disregarding claimant's pain testimony because "(1). . . he left his job because he was laid off, rather than because he was injured; (2) [he] waited nine months after he was laid off before seeking any medical attention; and (3) [he] failed to seek treatment despite his complaints of severe pain.").

Second, Ms. Ankney contends that the ALJ misinterpreted the medical evidence. As discussed earlier, she is correct with respect to developing the evidence about and evaluating the

effect of hepatitis C on her liver condition and, consequently, her fatigue. Although the ALJ concluded that Ms. Ankney's credibility was undermined by an October 2005 medical note that she "had not checked her hepatitis C in quite some time, which indicates that it is not as severe as alleged" (AR 17), the same medical note indicated that a liver biopsy had not been performed the previous year because her heart condition had been discovered (AR 261). Similarly, the ALJ erred by relying on a July 2006 medical notation that her blood work "looked good" and that she had been told that her "liver was okay" in December 2006. (AR 17.) The July 2006 treatment note did not account for the possibility that patients with hepatitis C can have severely damaged livers yet return normal blood work (AR 361) and the December 2006 treatment note referred to a statement made to Ms. Ankney in 1990 (AR 326).

Ms. Ankney is less persuasive with regards to the ALJ's assessment of lessened credibility with respect to her status post-cardiac surgery, pain, and, with an important exception, medication non-compliance. (AR 16.) "One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record." SSR 96-7p. Furthermore, an "individual's statement may be less credible if . . . the medical reports or records show that the individual is not following the treatment as prescribed and there are no good reasons for this failure." *Id.* With respect to any lingering effects from her heart condition, Ms. Ankney reported, in September 2006, an ability to walk more than four blocks and up more than two flights of stairs. (AR 329.) Her treating cardiologist concluded that her heart condition was asymptomatic. (AR 330-31.) The following month, Ms. Ankney reported to her primary care provider that she was without cardiac symptoms. (AR 322.) With respect to pain as the result of her abdominal hernia, there is evidence that her pain responded well to medication and remained

at a controllable level. (AR 322-25.) With respect to medication non-compliance, there is an indication that Ms. Ankney at times did not comply with treatment for certain chronic conditions. In November 2005, her hypertension could not be evaluated because she had not taken her medications that day. (AR 258.) In 2006, she acknowledged that she had medication non-compliance issues and that her blood pressure was difficult to control because she often forgot to take her medications.[9] (AR 329-32.)

Third, Ms. Ankney contends that the ALJ should not have found that her failure to seek medical treatment for depression, hepatitis C, and diabetes lessened her credibility. She is correct to the extent that the ALJ declined to consider the undisputed evidence that Ms. Ankney's financial circumstances inhibited her ability to treat her conditions as quickly, comprehensively, or aggressively as she and her treating physicians would have preferred. In October 2004, prior to the discovery of Ms. Ankney's heart condition, her primary care physician Dr. Norman Seaholm noted that "one way or another we need to keep her insured given her current issues." (AR 286.) Dr. Seaholm later noted, after a specialist had performed coronary bypass graft surgery on Ms. Ankney, that she had "given up COBRA so is not covered for services other than surgical follow up." (AR 270.) Ms. Ankney left Dr. Seaholm's care to be seen on a sliding-scale at Community Health Clinic due to her lack of insurance and inability to pay. (AR 250, 311, 354.) In May 2006, her new healthcare provider noted that Ms. Ankney had not consulted a surgeon about her abdominal hernia because she was uninsured. (AR 325.) This physician chose to wait a month

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[9] The record thus suggests that her medication non-compliance predates her present lack of insurance and employment and has not always been related to her financial circumstances. (*See, e.g.*, AR 329.) However, as discussed below, it appears that Ms. Ankney's ability to take her medication is also presently inhibited by an inability to afford them. (*See, e.g.*, AR 322, 329.)

before making referrals for Ms. Ankney's chronic conditions so that it would be clear whether Ms. Ankney would be covered or needed to pay on a sliding scale. (*Id.*) In September 2006, her physician noted that Ms. Ankney had, in the past, forgotten to take her medications, which was "compounded by her lack of insurance or income which has delayed some of her medical care." (AR 329; *see also* AR 41.) A disability claimant cannot be denied benefits for failing to obtain medical treatment that would ameliorate his condition if she cannot afford that treatment. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Similarly, it was inappropriate for the ALJ to find that Ms. Ankney's credibility was lessened by relying upon her failure to seek medical treatment without also considering the impact of her inability to pay for treatment.[10]

In footnotes, Ms. Ankney also complains that the ALJ erred by rejecting Dr. Seaholm's opinion in a November 2005 letter. (Dkt. 14, at 12 n.2; Dkt. 19, at 3 n.1.) Dr. Seaholm stated as follows:

> [Ms. Ankney] has a number of chronic medical conditions that will likely preclude her from working, including Type 1 Diabetes that is not optimally controlled, hypertension, hyperlipidemia, coronary artery disease, and chronic active Hepatitis C. At this time she is unable to afford the medications or the evaluations required to manage these conditions which will likely lead to a gradual deterioration in her functional capacity. *I cannot comment on her current ability to work as I have not seen her in the office for over 9 months*, but I can say clearly that her *future* abilities will be severely compromised if these medical issues go unchecked.

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[10] Thus, Ms. Ankney is correct that the ALJ erroneously found that her lack of psychiatric treatment lessened her credibility regarding the severity of her mental impairment and symptoms. (AR 15.) Furthermore, as the Ninth Circuit has noted, an ALJ cannot discredit a diagnosis of depression based on a claimant's failure to seek treatment for it: by some counts, two-thirds of the 17 million adults nationwide who suffer from depression every year do not seek treatment. *See Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). Ms. Ankney does not, however, specifically challenge the ALJ's other reasons for concluding that Ms. Ankney's mental impairment is not severe, which include the State Agency Psychiatric Review Technique form as well as statements by a friend about her abilities to problem-solve and interact with co-workers. (AR 14.)

> It is my understanding that . . . her liver function has deteriorated, and that she has developed a hernia . . . . These will also likely need intervention *but that information should be obtained from her current treating physician.*

(AR 41 (emphases added).) In giving minimal weight to Dr. Seaholm's opinion, the ALJ found that Dr. Seaholm could not comment on Ms. Ankney's current ability to work, had not treated her recently, and did not refer to specific support in the record.[11] (AR 17.) To the extent that the ALJ rejected Dr. Seaholm's ultimate conclusion—and Dr. Seaholm himself appears to have suggested a possible *future* disability rather than a present one—the ALJ supported his conclusion, except as noted, with specific and legitimate reasons for doing so. For example, the ALJ referred to Ms. Ankney's performance of daily activities that are consistent with sedentary work, to medical evidence that Ms. Ankney's heart condition was largely asymptomatic, and to the lack of medical evidence that pain interfered with her ability to concentrate or to perform sedentary work. (AR 16-17.)

The Court notes that the ALJ did not entirely reject Ms. Ankney's subjective complaints; rather, the ALJ questioned her statements concerning the "intensity, persistence and limiting effects of these symptoms." (AR 17.) In fact, the ALJ gave more credence to Ms. Ankney's subjective complaints than he did to the contradictory State Agency Physical RFC Assessment that found her capable of performing more strenuous work. (*Id.*) Nevertheless, because the Court recommends remanding with respect to other issues, the Court recommends that the ALJ revisit his credibility assessment in order to consider (a) Ms. Ankney's complaints of fatigue related to

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[11] Ms. Ankney notes that Dr. Seaholm treated her for several months during her claimed period of disability. (Dkt. 14, at 12 n.2; Dkt. 19, at 3 n.1.) Dr. Seaholm did not, however, state that he considered her to be disabled during that time or that she was unable to perform sedentary work.

hepatitis C and liver damage, and (b) her inability to pay for treatment.

C. Vocational Expert Testimony and Specific Findings Regarding Past Relevant Work

Ms. Ankney contends that the ALJ's step four finding was unsupported by the evidence and contrary to the law because the VE was not properly sworn in pursuant to 20 C.F.R. § 404.950(e) and the ALJ did not sufficiently analyze whether she was capable of performing past relevant work. (Dkt. 14 at 14-15.) The Commissioner concedes that the VE was not properly sworn in as a witness but argues that any error the ALJ committed by relying on the VE's testimony was harmless because the undisputed evidence shows that Ms. Ankney had previously worked as a customer service clerk, Dictionary of Occupational Titles (DOT) # 241.367-014 (sedentary, skilled), and as a pricing clerk, DOT # 216.382-034 (sedentary, semi-skilled). (Dkt. 18, at 11); *see* U.S. Dep't of Labor, Dictionary of Occupational Titles (DOT), App. C, ## 216.382-034 (Cost-Clerk), 241.367-014 (Customer-Complaint Clerk) (4th ed. 1991). The Commissioner is correct.

An ALJ's decision will not be reversed for harmless errors. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). Few errors could be as harmless as the one committed here. Ms. Ankney was represented by counsel at her hearing, and that counsel received notice that Michael Swanson would be testifying as a VE (AR 25) along with a copy of Mr. Swanson's resume (AR 33). The ALJ asked Ms. Ankney's counsel if she objected to taking testimony from the VE, and she responded, "No." (AR 342.) After the VE's testimony, the ALJ asked Ms. Ankney's counsel if she contested any of the conclusions, to which counsel responded, "No." (AR 344.) In disability hearings, "strict rules of evidence, applicable in the courtroom, are not to operate so as to bar the admission of evidence otherwise pertinent," and the emphasis is upon the informal rather

than the formal so long as the proceedings are fundamentally fair. *Richardson v. Perales*, 402 U.S. 389, 400 (1971). The ALJ offered Ms. Ankney's counsel ample opportunity to cross-examine the VE, but counsel declined. *See generally Copeland v. Bowen*, 861 F.2d 536, 539 (9th Cir. 1988) ("A claimant in a disability hearing is not entitled to unlimited cross-examination, but is entitled to such cross-examination as may be required for a full and true disclosure of the facts."). Ms. Ankney does not dispute that she worked for twenty-two years as a customer service clerk and as a pricing clerk, does not challenge the applicability of the relevant DOT job classifications, and does not contend that her work as actually performed differed from the classifications. The ALJ did not simply rely upon a generic classification of her past work or emphasize only one facet of her job duties. *See, e.g.*, *Carmickle v. Commissioner of SSA*, 533 F.3d 1155, 1166-67 (9th Cir. 2008). Rather, the ALJ relied upon the VE's testimony and Ms. Ankney's consistent testimony to find that Ms. Ankney had performed past relevant work identified by specific DOT numbers. (AR 18, 73-74, 341-44.)

The Court recommends affirming the ALJ's reliance upon the VE's testimony and the ALJ's findings regarding past relevant work.

D. The ALJ's Alternative Findings at Step Five

At step 5 of the sequential evaluation process, the burden shifts to the Commissioner to show the claimant can perform other jobs that exist in the national economy. *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). To carry this burden, the Commissioner may rely either upon VE testimony or the Medical-Vocational Guidelines (Grids), 20 C.F.R. pt. 404, subpt. P, app. 2. *See Tackett*, 180 F.3d at 1099. Ms. Ankney contends that the ALJ erred in his step five alternative holding because he failed to find that she was disabled as of her fiftieth birthday in

January 2005, as was required under Grids Rule 201.14, i.e., because she was closely approaching advanced age and has no transferrable skills. (Dkt. 14, at 15-16.) The Commissioner concedes that the ALJ erred in making his step five finding. (Dkt. 18, at 10.)

The ALJ appears to have used the wrong birth date for Ms. Ankney and thereby misapplied the Grids Rule 201.14. (*See* AR 18 (referring to a 2005 birth date rather than to a 1955 birth date).) If on remand the ALJ finds that Ms. Ankney is able to perform her past relevant work, then this error was harmless because the ALJ would not be required to proceed to step five. If on remand the ALJ finds that Ms. Ankney is unable to perform her past relevant work, then he must revisit his step five assessment. The Court therefore recommends that the ALJ revisit his step five finding only if further development of the administrative record warrants doing so.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court's instructions. With respect to reassessing RFC, the ALJ should develop the record about the liver biopsy results, hepatitis C, and fatigue. With respect to reassessing credibility, the ALJ should discuss the new evidence and the impact of Ms. Ankney's inability to pay for treatment. The ALJ should then reevaluate his step four findings and, if necessary, his step five findings. A proposed order accompanies this Report and Recommendation.

DATED this 14th day of January, 2009.

Mary Alice Theiler
United States Magistrate Judge